



National Aeronautics and
Space Administration
Washington, DC 20546

Procurement Information Circular

PIC 11-05

August 19, 2011

FAR 37.106 – Funding and Term of Service Contracts

PURPOSE: To provide guidance to all NASA Centers on the funding and term of severable services contracts.

BACKGROUND: One tenet of Appropriations Law is that “the authority of all government contracting officers is circumscribed by statutory restrictions on the obligation and expenditure of appropriated funds.” See 67 Comp. Gen. 190 (1988). FAR 37.106 reflects this tenet, stating “when contracts for services are funded by annual appropriations, the term of the contract shall not extend beyond the end of the fiscal year of the appropriation except when authorized by law.” This tenet also applies to multiple year appropriations (e.g. 2 year appropriations) with the period of availability dictating the length of the basic contract. See, for example, 68 Comp. Gen. 170,171 (1989) and B-317636 (April 21, 2009).

GUIDANCE: The following guidance is being provided to reinforce existing FAR policy and to ensure that all procurement personnel fully understand the policy and regulations regarding the funding and term length relative to severable services contracts.

1. For all severable services contracts, the basic period of performance shall not extend beyond the date of the availability of the funds initially obligated to the contract at the time of award. The Bona Fide Needs Rule, codified at 31 U.S.C. 1502, also provides that an appropriation or fund with a definite period is available to complete contracts properly made within that period of availability. The period of performance of any options on severable services contracts shall also not extend beyond the period of availability of funds. Contracts including such options shall contain the appropriate “Availability of Funds” clause.
2. The severability of the work and compliance with Bona Fide Needs Rule is best made as early as possible in the acquisition planning process. Contracting Officers, in collaboration with the requirements initiator and supporting Center Financial and Legal personnel should ensure, in accordance with FAR 7.105 and NFS1807.105, that funding and term of severable services contracts are considered and discussed in acquisition

planning documentation, including the severability of the work and compliance with Bona Fide Needs Rule. A Bona Fide Need Decision Matrix can be found in enclosure 1. Bona Fide Needs – Terms and Business Rules can be found in enclosure 2.

APPLICABILITY: All severable services contract awards after the effective date of this PIC.

REFERENCES: Enclosure 1, *Bona Fide Need Decision Matrix*; Enclosure 2, *Bona Fide Need – Terms and Business Rules*. Additional reference materials are available on the Office of the Chief Financial Officer's home page, under the Policies & Procedures tab, *Guidance on Expiring Appropriations* at: <http://www.nasa.gov/offices/ocfo/policies/gea.html>.

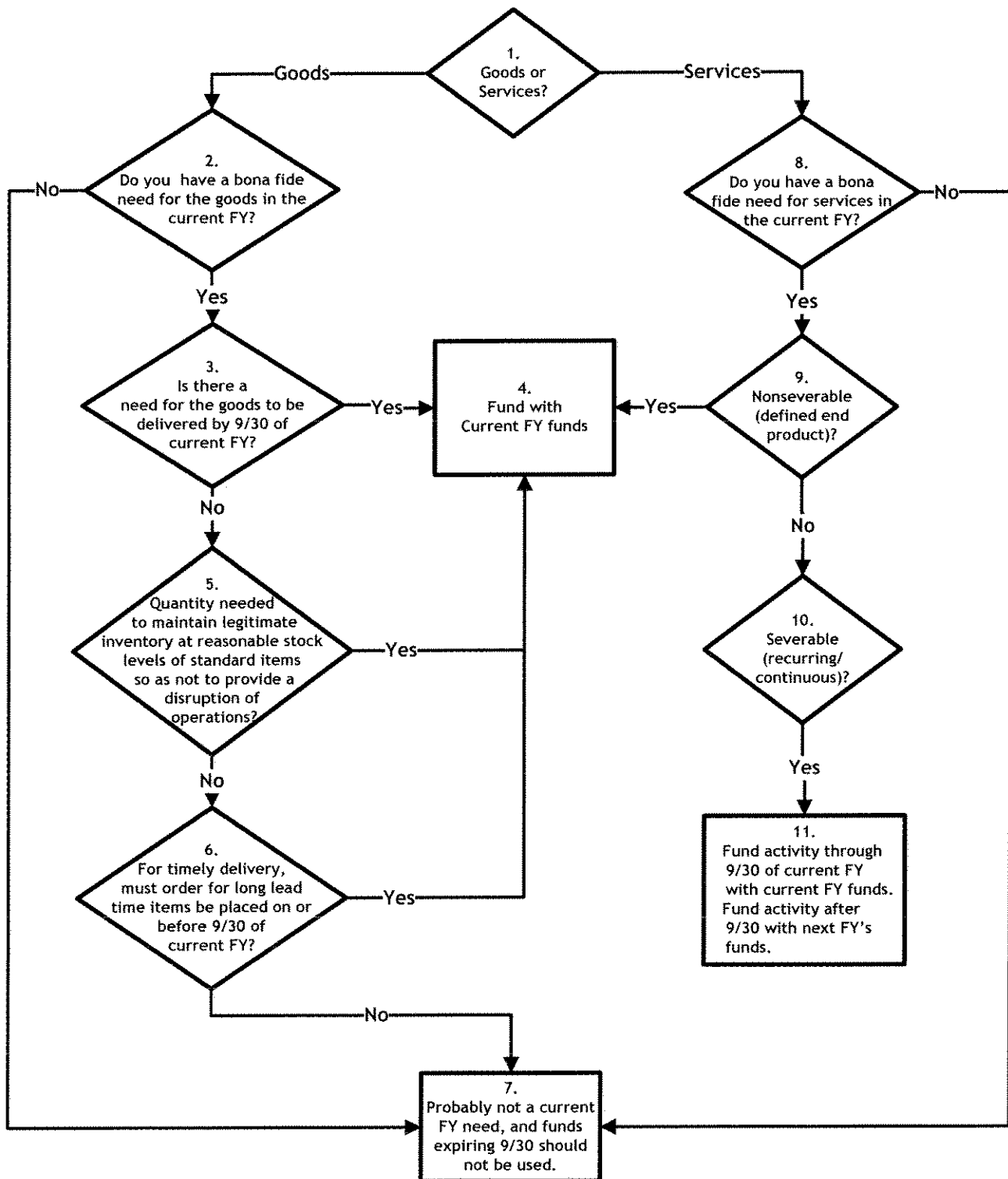
EFFECTIVE DATE: This PIC is effective as dated and shall remain in effect until cancelled or superseded.

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Bona Fide Need Decision Matrix



Note: For multiple-year appropriations, 9/30 would refer to the year the appropriation expires, and bona fide need and delivery would be determined by the period of availability of the appropriation.

BONA FIDE NEED – TERMS AND BUSINESS RULES

Antideficiency Act (ADA)	— One of the major laws through which Congress exercises constitutional control of the public purse. Some of its prohibitions include: making or incurring overobligation or overexpenditure from an appropriation, apportionment, or formal subdivision thereof (i.e., allotment or suballotment, if issued, under NASA Fund Control Regulations); making or incurring expenditures or obligations in advance of an appropriation unless authorized by law; and accepting voluntary services unless authorized by law. Additional restrictions include: only using an appropriation for its intended purpose and, for appropriations made for a definite period (e.g., two-year funds), only using the appropriation for expenses and obligations properly incurred during that time (“bona fide needs” rule). ADA constraints apply to all phases of an appropriation's life cycle. (<i>NPR 9470.1; (31 U.S.C. § 1301(a), 1341(a)(1)(A)&(B), 1342, 1517(a), 1502(a), and 1514(a); NPR 9470.1, Attachment D, “NASA Fund Control Regulations”)</i>)
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Bona Fide Need	— An appropriation or fund limited for obligation to a definite period [typically two years for most NASA projects] is available only for payment of expenses properly incurred during the period of availability, or to complete contracts properly made and obligated within the period of availability. That is, the obligation must be to satisfy a need of the agency that arose during the period of availability (with certain limited exceptions) and must meet the purpose and availability of funds established in the appropriation. (<i>NPR 9470.1; 31 U.S.C. § 1502(a; Principles of Federal Appropriations Law, Chapter 5.B.)</i>)
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Budget Authority	— The authority to incur financial obligations that will result in outlays. The basic four forms are appropriations, borrowing authority, contract authority, and spending authority from offsetting collections. NASA only has appropriation and spending authority. (<i>OMB Circular No. A-11, Section 20.4(a); NPR 9470.1; Senate.gov glossary; 2 U.S.C. § 622; Principles of Federal Appropriations Law, Chapter 2.A.2.)</i>)
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Budget Authority Phases	— There are three phases to a budget authority's life cycle: Unexpired, Expired, and Canceled. Only during the Unexpired Phase (current/available period) may "new" obligations be made. The Unexpired Phase is the time period during which budget authority is available for incurring "new" obligations and lasts for the number of years provided in the appropriations (one year, two year,
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etc.). No-year authority lasts indefinitely. (*OMB Circular No. A-11, Section 20.4(c)*)

Contract	— An agreement creating obligations enforceable by law. The basic elements of a contract are mutual assent, consideration, capacity, and legality. At NASA, the term is often used to refer to both public contracts and Space Act Agreements, although the agreements are executed under other transaction authority and are distinguished from contracts in law and by GAO. (<i>Cornell Legal Information Institute, CRS Report for Congress: Other Transaction (OT) Authority, GAO Report 03-150, GAO Report B-298804, 42 U.S.C. § 2473(c)(5), 31 U.S.C. § 3324</i>)
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Cooperative Agreement or Grant	— A federal financial assistance award making payment in cash or in kind for a specified purpose. For a grant, NASA is not expected to have substantial involvement with recipient (the state or local government or other entity) while the contemplated activity is being performed. For a cooperative agreement, NASA is expected to have substantial involvement with recipient while the contemplated activity is being performed. (<i>NPR 9470.1, OMB Circular No. A-133, 31 U.S.C. § 6304 and 6305</i>)
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Cost Accruals	— “NASA’s accounting records are maintained on an accrual basis, i.e., revenues are recorded in the accounts when earned and expenses are recorded when incurred, even though disbursements and collections are not recorded until funds are paid and collected. Use of the accrual method is mandated by” law. (<i>NPR 9060.1, Section 1.1.1; FSIO’s FMLoB Glossary; 31 U.S.C. § 3512(e)</i>)
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Economy Act Agreement	— An agreement to obtain goods or services from another agency or major unit of the same agency, under the terms of 31 U.S.C. § 1535. The amount obligated must be deobligated to the extent that the performing agency/unit has not incurred obligations before the end of the period of availability of the ordering appropriation and set agreement period of performance. Funds may not be obligated by the performing agency after the ordering agency’s appropriation expires and set agreement period of performance. (<i>NPR 9470.1, 31 U.S.C. § 1535</i>)
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Forward Funding	— (1) Budget authority that is made available for obligation beginning in the last quarter of the fiscal year for the financing of ongoing activities (usually grant programs) during the next fiscal year. This funding is used mostly for education programs, so that obligations for grants can be made prior to the beginning of the next school year. The budget records the budget authority in the fiscal year in
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which it is appropriated. For example, the following language, if it appeared in an appropriation act for 2007, would provide forward funding: "... of which \$2,000,000 shall become available on July 1, 2007 and shall remain available through September 30, 2008 for academic year 2007–2008." (2) NASA sometimes uses this term to refer to incurring any obligation to cover a bona fide need for the following fiscal year using current year funds that would have carried over and remained available in the following fiscal year. (NPR 9470.1; GAO's "A Glossary of Terms Used in the Federal Budget Process"; OMB Circular No. A-11, Section 20.4(c))

**Incrementally
Funded Contract**

- A contract in which the total work effort is performed over multiple time periods and funds are allotted to cover discernible phases or increments of performance. This funding method allows for contracts to be awarded for periods in excess of one-year, even though the total estimated amount of funds to be obligated for the contract is not available at the time of contract award. An agreement to pay "special termination" costs under an incrementally funded contract creates a firm obligation, not a contingent liability, to pay the contractor because the contracting agency remains liable for the costs even if it decides not to fund the contract further. This obligation remains until the contract is fully funded. (U.S. Army Corps of Engineers, Office of the Principal Assistant Responsible for Contracting (OPARC)) [hyperlink not available – document provided upon request]; Principles of Federal Appropriations Law, Chapter 6.C.2.b.(3); GAO Report B-238581)
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**Indefinite-Delivery/
Indefinite-Quantity
Contract**

- A form of an indefinite-quantity contract under which the agency may place orders at any time during a fixed period; actual delivery dates during that period are undefined in the contract. The contract obligates the government only to order the minimum quantity of supplies or services, and that minimum amount is recorded as an obligation when the contract is executed, against the appropriation current at that time. (GAO Report B-302358; FAR 16.504(a); Principles of Appropriations Law, Chapter 6.C.2.b.(4))
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**Indefinite-Quantity
Contract**

- A contract that provides for an indefinite quantity of supplies or services, within stated limits, during a fixed period. The contractor is required to furnish at least a stated minimum quantity of supplies or services and, if ordered, additional amounts above the minimum, not to exceed the stated maximum. (FAR 16.504(a); Principles of Federal Appropriations Law, Chapter 7.B.1.e.; GAO Report B-302358. Additional discussion: Principles of Federal Appropriations Law, Chapter 6.C.2.b.(3))

Inventory (maintaining)	— Agencies normally maintain inventories of common use items. The bona fide needs rule does not prevent maintaining a legitimate inventory at reasonable and historical levels, the “need” being to maintain the inventory level so as to avoid disruption of operations. The problem arises when the inventory crosses the line from reasonable to excessive. (<i>Principles of Federal Appropriations Law, Chapter 5.B.1.b.</i>)
Multiple Year Contract	— A contract having a term of more than one year, regardless of fiscal year funding. FAR Part 22 indicates that this includes multiyear contracts, although FAR Part 17 and the Principles of Federal Appropriations Law provide criteria to distinguish between the two. (<i>FAR 22.1001; FAR 17.103; Principles of Federal Appropriations Law, Chapter 5.B.8.a.; GAO Report B-302358</i>)
Multiyear Contract	— A contract covering the needs or requirements of more than one fiscal year without establishing and having to exercise an option for each program year after the first. The multiyear contract may cover no more than five program years. 10 U.S.C. § 2306b & c set forth the criteria that NASA’s multiyear contracts must meet, and the Principles of Appropriations Law provide the following example to help in determining whether a contract is or is not “multiyear”: “A contract for the needs of the current year, even though performance may extend over several years, is not a multiyear contract... Thus, a contract to construct a ship that will take 3 years to complete is not a multiyear contract; a contract to construct one ship a year for the next 3 years is.” (<i>FAR 17.103; Principles of Federal Appropriations Law, Chapter 5.B.8.a.; GAO Report GAO-08-298; 10 U.S.C. § 2306b and 2306c. Additional discussion: Principles of Federal Appropriations Law, Chapter 6.C.2.b.(4)</i>)
Nonseverable (Entire) Service	— (1) A service that, by its nature, cannot be separated for performance in separate fiscal years. The service involves work which cannot be separated into components for performance in different fiscal years, but constitutes a specific, entire job with a defined end product that must be performed as a single task to meet a need of the government. The entire contract price should be charged to the fiscal year appropriation current at the time the contract was made, notwithstanding that performance may extend into future fiscal years. A limitation of funds clause does not affect the applicable bona fide needs rule and the severable test. (2) Training tends to be nonseverable. Thus, where a training obligation is incurred in one fiscal year, the entire cost is chargeable to that year, regardless of the fact that performance may extend into the following year. (<i>Uscourts.gov’s JP3 Glossary of Terms; Principles of Appropriation Law, Chapter 5.B.5.; GAO Report B-</i>

240264; GAO Report B-235678; GAO Report B-257977; GAO Report B-259274; GAO Report B-37929; GAO Report B-241415; 79th Fiscal Law Course Deskbook, Chapter 3.IV.F.3. [hyperlink not available – document provided upon request])

Requirements Contract

- A contract in which the government agrees to purchase all of its needs for the particular item or service during the contract period from the contractor, and the contractor agrees to fill all such needs, with deliveries or performance to be scheduled by placing orders with the contractor. It may be appropriate for acquiring any supplies or services when the Government anticipates recurring requirements but cannot predetermine the precise quantities of supplies or services that designated Government activities will need during a definite period. Obligations are not recorded until orders are placed. (*FAR 16.503; GAO Report B-144641; 79th Fiscal Law Course Deskbook; Chapter 3.IX.B.3. [hyperlink not available – document provided upon request])*)
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Severable Service

- A service that can be separated into components that independently meet a need of the government. The services are continuing and recurring and, by definition, address needs of the time the services are rendered. To the extent a need for a specific portion of continuing or recurring services arises in a subsequent fiscal year, that portion is severable and chargeable to appropriations available in the subsequent year. Funding may not cross fiscal years unless authorized by statute, and agencies must fund severable service contracts with dollars available for obligation on the date the contractor performs the services. (*Uscourts.gov's JP3 Glossary of Terms; Principles of Appropriation Law, Chapter 5.B.5.; GAO Report B-259274; GAO Report B-240264; 79th Fiscal Law Course Deskbook, Chapter 3.IV.F.4. [hyperlink not available – document provided upon request])*)
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Severable Service Crossing Fiscal Years

- If express authority exists in law, during the last year in which an appropriation is available for “new” obligations, agencies may enter into a contract for procurement of severable services for a period that begins in one fiscal year and ends in the next fiscal year if (without regard to any option to extend the period of the contract) the contract period does not exceed one year. DoD and USCG may also use this authority for the purpose of leasing real or personal property, including the maintenance of such property when The lease of real or personal property. Funds made available for a fiscal year may be obligated for the total amount of a contract. Currently, NASA does not have this authority. (*10 U.S.C. § 2410a, 41 U.S.C. § 253l, 41 U.S.C. § 252(a)(1), FAR 37.106*)
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Severable Test

- If a service contract is to be performed partially in one fiscal year and partially in the next and the contract is terminated at the end of the first fiscal year and is not renewed, what do you have? Three examples of applying the severability test are given in the Principles of Federal Appropriations Law: "In the case of a window-cleaning contract, you have half of your windows clean, a benefit that is not diminished by the fact that the other half is still dirty. What you paid for the first half has not been wasted. These services are clearly paid for the first half has not been wasted. These services are clearly severable. Now consider a contract to conduct a study and prepare a final report, as in 65 Comp. Gen. 741 (1986). If this contract is terminated halfway through, you essentially have nothing. The partial results of an incomplete study, while perhaps beneficial in some ethereal sense, do not do you very much good when what you needed was the complete study and report. Or suppose the contract is to repair a broken frammis. If the repairs are not completed, certainly some work has been done but you still repairs are not completed, certainly some work has been done but you still don't have an operational frammis. The latter two examples are nonseverable." A limitation of funds clause does not affect the applicable bona fide needs rule and the severable test. (*Principles of Appropriation Law, Chapter 5.B.5.*)
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Space Act Agreement

- A binding agreement entered into under the "other transaction" authority in the Space Act between NASA and another party ("Agreement Partner"). Space Act Agreements can be Reimbursable (NASA's costs are reimbursed for its unique goods, services, or facilities), Nonreimbursable (there is no exchange of funds), or Funded (appropriated funds are transferred to a domestic Agreement Partner to accomplish an Agency mission). Properly obligated budget authority remains obligated after the appropriation expires for liquidating the ordering agency's obligation as the performing agency completes the work (i.e., it does not have to be deobligated before the appropriation expires, like Economy Act obligations). However, as with other contractual obligations, once the agency liquidates the obligation, any remaining balances are subject to the original purpose and time limitations and are not available for new obligation after the account has expired. "Other transaction" authority is distinguished from contracts in law and by GAO and generally are not subject to federal laws and regulations applicable to procurement contracts. (*NPR 9470.1, NPD 1050.1, GAO Report B-302760, 42 U.S.C. § 2473(c)(5), 31 U.S.C. §3324, CRS Report for Congress: Other Transaction (OT) Authority, GAO Report B-298804, GAO Report 03-150*)
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